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In the Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES E. KERN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that 18 U.S.C. 1512(a)(1), which prohibits the knowing use of intimidation with intent to influence the testimony of a witness in an official proceeding, is void for vagueness and overbroad in violation of the First and Fifth Amendments to the United States Constitution.

1. Petitioner, a former Border Patrol agent, was convicted of knowingly intimidating and attempting to intimidate a fellow Border Patrol agent with intent to influence his testimony before a federal grand jury, in violation of 18 U.S.C. 1512(a)(1).[1] He was sentenced to 18 months' imprisonment.

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[1]Petitioner and a co-defendant, Lonnie E. Wiemers, were acquitted of charges of deprivation of rights under 18 U.S.C. 242 and of conspiracy to violate 18 U.S.C. 1512(a)(1). Wiemers' conviction for a substantive violation of Section 1512(a)(1) was reversed on appeal for insufficient evidence (Pet. App. A9, A14).

The evidence at trial showed that petitioner, co-defendant Lonnie Wiemers, and David Offutt were employed as Border Patrol agents in El Paso, Texas, when Jorge Dominguez, a twelve-year old boy, was chased and beaten by two men he identified as Border Patrol agents. Wiemers stated to Offutt that he and petitioner were responsible. Offutt appeared before a grand jury investigating the assault on May 3 and September 6, 1983; his testimony implicated Wiemers and petitioner. Pet. App. A2-A3. In a confrontation between Offutt and petitioner in July, Offutt told petitioner "you're going to get just what you got coming, and I'm going to help you" (Pet. App. A4). Petitioner responded "So are you" (*ibid.*). Later that month, petitioner (accompanied by an unidentified man) ordered a rubber stamp reading "Fink Offutt," and in July and August the phrase was stamped on papers in Offutt's mail drawer, around the Border Patrol station, and on the office bulletin board (Pet. App. A4-A5, A7). In August, in order to escape this harassment, Offut requested a temporary transfer to the nearby Ysleta Border Patrol station; shortly before he was to start work there, a "Fink Offutt" sign was posted outside that station. Finally, while driving home after a meeting on September 1 with a government attorney to discuss his grand jury testimony, Offutt observed petitioner and Wiemers in a truck in front of his house. They left as he approached; after he had followed them for a while, they turned around and drove off (Tr. 638-639). This incident led Offutt's wife to fear for their children's safety; because of this and because Offutt "had had all of it I could take" (Tr. 640), he requested and received a transfer to Idaho (Tr. 640-643; Pet. App. A5).

3. At trial, the court instructed the jury on the elements of Section 1512(a)(1) (Tr. 1050):

> In order to establish the offense of intimidation with intent to influence the testimony of a person in an

official proceeding, the Government must prove three essential elements beyond a reasonable doubt:

First, that the Defendants used intimidation or attempted to do so.

Second, that the Defendants acted with intent to influence the testimony of David Offutt with respect to an official proceeding.

And third, that the Defendants acted knowingly and willfully.

The term "intimidation" means to make timid or fearful, to inspire or affect with fear, or to deter as by threats.

2. Petitioner contends that the term "intimidation" in 18 U.S.C. 1512(a)(1) is inherently vague and failed to put him on notice of what conduct was prohibited by the statute. He also asserts that it poses "a danger of arbitrary and discriminatory enforcement" (Pet. 4). The court of appeals, in upholding the constitutionality of the statute, noted "the statute's facial clarity" and held that the "notion of intimidation is not so indefinite as to fail to put ordinary people on notice of what conduct is proscribed" (Pet. App. A13).[2]

The statute under which petitioner was convicted is part of the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 *et seq.* The Senate Report indicates that the amendments were intended to "lower[] the threshhold of seriousness for commission of an intimidation offense." S. Rep. 97-532, 97th Cong., 2d Sess. 14 (1982). Concerning Section 1512(a), the Report stated (*id.* at 15):

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[2]The last sentence reproduced at Pet. App. A13 is missing a line of the court of appeals' opinion. The sentence should read:

> This argument overlooks the fact that not all forms of speech and conduct are protected by the constitutional guarantees of freedom of speech and association.

> Current law * * * does not address the most common form of intimidation—verbal harassment. Testimony given to the ABA suggested that sometimes innocent acts, such as telephoning a victim to say hello, coming to his home, or even driving a motorcycle by, may be extremely effective in preventing a victim or witness from testifying. This type of activity is not covered by section 1503 which requires corruption, threats or force for an offense. Section 1510 includes intimidation as a method of obstructing criminal investigations in addition to force, threats, bribery and misrepresentation; however, nowhere is intimidation defined. The Committee believes a clear and straightforward prohibition of such activity will increase prosecution of such cases, where warranted.

The Due Process Clause of the Fifth Amendment requires that a criminal statute "define a criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). Section 1512(a)(1) easily meets that standard.

In considering challenges to statutes as unconstitutionally vague, this Court has held that the existence of a scienter requirement as a necessary element of the offense "does much to destroy any force in the argument that application of the [statute] would be so unfair that it must be held invalid." *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340 (1952).[3] In *Screws* v. *United States*, 325

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[3]The scienter requirement similarly guards against arbitrary and discriminatory enforcement, since the prosecution must persuade the trier of fact that the defendant actually intended the prohibited result.

U.S. 91, 101-102 (1945) (plurality opinion), the Court stated:[4]

> [T]he requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. * * * [W]here the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware.

Section 1512(a)(1), which makes unlawful the knowing use of, or attempt to use, intimidation with the intent to influence a witness's testimony, contains such a requirement.[5]

Without suggesting that there is any uncertainty respecting the application of the statute to the conduct for which he was convicted, petitioner argues (Pet. 5) that a greater degree of specificity is required of this statute because it is capable of reaching speech and conduct protected by the First Amendment. Cf. *United States* v. *Powell*, 423 U.S.

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[4]This language from the plurality opinion in *Screws* was cited with approval in *Colautti* v. *Franklin*, 439 U.S. 379, 395 n.13 (1979), in which this Court invalidated a state statute that employed an ambiguous term and that lacked a scienter requirement.

[5]The jury instructions, to which petitioner does not object, clearly informed the jury that in order to convict, they had to find that petitioner intended to intimidate Offutt. Thus, unlike *Coates* v. *Cincinnati*, 402 U.S. 611, 613 (1971), upon which petitioner relies (Pet. 5), it is clear in this case that petitioner's conviction was based on the jury's finding about his own intent.

87, 92 (1975); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975). However, as noted above, the statute at issue here is narrowly drawn. The fact that intimidation can be, and often is, accomplished by speech does not, without more, infringe First Amendment rights.[6] In *Watts* v. *United States*, 394 U.S. 705, 707 (1969), this Court held that 18 U.S.C. 871(a), which makes it unlawful "knowingly and willfully" to make a threat against the life of the President of the United States, is constitutional on its face. In so doing, the Court stated (394 U.S. at 707):

> Nevertheless, a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.

The Court there found (*id.* at 708) that the statute requires a true "threat," not mere "political hyperbole." So too in this case, so long as the government has proven intimidation with intent to influence testimony and not merely conversation and association lacking a proven improper purpose, the First Amendment is not implicated.[7]

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[6]Here, of course, petitioner's conduct, which included sitting in his truck in front of Offutt's house while Offutt was away, extended beyond speech.

[7]As the court of appeals noted (Pet. App. A13), the only other decision discussing the constitutionality of Section 1512(a)(1) is *United States* v. *Wilson*, 565 F. Supp. 1416 (S.D.N.Y. 1983). However, as the court in *Wilson* observed (*id.* at 1430), convictions under similar statutes have been upheld although based solely on speech. *E.g.*, *United States* v. *Kelner*, 534 F. 2d 1020 (2d Cir.), cert. denied, 429 U.S. 1022 (1976) (conviction upheld under 18 U.S.C. 875(c), which prohibits transmission in interstate commerce of a communication containing a "threat to injure the person of another"); *United States* v. *Fasolino*, 586 F.2d 939 (2d Cir. 1978) (conviction upheld under 18 U.S.C. 1503, which makes it unlawful, "by threats • • • or by any threatening letter or communication, [to] endeavor[] to influence, intimidate, or impede" officers of the court and jurors).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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